

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
July 2, 1999 Session

AMY LYNN SURBER v. RALPH LEE CANNON

Appeal from the Circuit Court for Davidson County
No. 95C-3592 Barbara Haynes, Judge

No. M1998-00928-COA-R3-CV - Filed February 14, 2001

Twice, while walking her dog, the then fourteen year old plaintiff witnessed the defendant, standing naked, masturbating in his garage. The defendant was criminally prosecuted. The plaintiff then commenced the underlying civil action against him, alleging outrageous conduct, intentional nuisance and malicious harassment under Tenn. Code Ann. § 4-21-701. The court directed a verdict on the nuisance and malicious harassment claims, and the jury found for the defendant on the outrageous conduct claim. In her appeal, the plaintiff challenges only the disposition of the malicious harassment claim. Because there was no evidence to establish all the elements of the tort of malicious harassment as set forth in *Washington v. Robertson County, Tennessee*, 29 S.W.3d 466 (Tenn. 2000), we affirm.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court
Affirmed and Remanded

PATRICIA J. COTTRELL, J., delivered the opinion of the court, in which William C. Koch, Jr., and WILLIAM B. CAIN, JJ., joined.

Charles R. Ray, Jeffery S. Frensley, Nashville, Tennessee, for the appellant, Amy Lynn Surber.

James L. Weatherly, Jr., Nashville, Tennessee, for the appellee, Ralph Lee Cannon.

OPINION

This case arose after the then fourteen year old Amy Surber twice witnessed her neighbor, Ralph Lee Cannon, masturbating in his garage. After he pleaded guilty to indecent exposure, she commenced the underlying action alleging outrageous conduct, intentional nuisance and malicious harassment under Tenn. Code Ann. § 4-21-701. In her sole issue on appeal, Ms. Cannon challenges the trial court's decision to enter a directed verdict on her claim of malicious harassment. The primary issue in this appeal involves determination of the elements of this statutorily created tort. At oral argument, counsel informed this court that the Supreme Court of Tennessee had agreed to respond to three questions certified from the United States District Court of the Middle District of

Tennessee regarding the interpretation of Tenn. Code Ann. § 4-21-701. On October 2, 2000, the Tennessee Supreme Court issued its opinion in *Washington v. Robertson County, Tennessee*, 29 S.W.3d 466 (Tenn. 2000), and addressed the parameters of the statutory tort of malicious harassment. The parties have filed supplemental authority regarding *Washington v. Robertson County* and its application to the facts of this case.

I. Facts

Ms. Surber, her mother, and sister had moved into their newly-built home on Sugar Maple Lane in Nashville in 1989 or 1990, as Ms. Surber was starting the ninth grade. They chose the location because Ms. Surber's grandmother lived next door. The Cannon family moved in across the street the same year. Ms. Surber made friends with Mr. Cannon's teenaged daughter and became acquainted with Mr. Cannon.

Every morning around five, Ms. Surber walked her dog. On March 12, 1991, while Ms. Surber was walking her dog, she heard a car door slam in the Cannon garage. She looked up, through the open garage door, and saw Mr. Cannon, who was nude and masturbating. After viewing him for one to five seconds, Ms. Surber ran around to the back of her house, and started yelling for her mother. Amy's mother called the police, but they declined to arrest Mr. Cannon for lack of evidence. Shortly thereafter, Ms. Surber's mother set up a video camera aimed at the Cannon house. Ms. Surber continued to walk her dog every morning, but promised that she would not look over at the Cannon house.

On the morning of March 25, 1991, while walking her dog, Ms. Surber looked over at the Cannon house and again witnessed Mr. Cannon standing naked in the garage, masturbating. She returned, crying, to her home. Her mother told her that she had captured Mr. Cannon's actions on videotape and informed the police. Mr. Cannon was arrested and prosecuted for indecent exposure. After his arrest, Mr. Cannon received extensive therapy. He entered a guilty plea, and received a fine and one year probation. As a condition of probation, he was required to continue his therapy and to perform 200 hours of public service. He also paid approximately \$14,000 in restitution for the counseling Ms. Surber received.

Ms. Surber's mother then commenced a civil suit against Mr. Cannon. However, she took a nonsuit in 1992. Upon reaching her majority in 1995, Ms. Surber initiated the underlying action, alleging outrageous conduct, intentional nuisance, and malicious harassment under Tenn. Code Ann. § 4-21-701. *See* Tenn. Code Ann. § 28-1-106. She sought \$250,000 in compensatory damages and \$250,000 in punitive damages.

The case was tried to a jury. Ms. Surber testified at length about the damage she attributed to Mr. Cannon's actions, including the necessity of years of therapy, placement in several schools, a hospital, and a children's home, and pregnancy at 16. Mr. Cannon testified about the extensive treatment he had obtained since his arrest. During cross-examination, he admitted that over a long course of conduct, he had never exposed himself to a male.

At the close of the plaintiff's case, Mr. Cannon moved for a directed verdict on all counts. The trial court directed verdicts on the claims of nuisance and malicious harassment. As to the malicious harassment claim, the court commented, "I simply cannot see how that particular statute [Tenn. Code Ann. § 4-21-701] applies." The court allowed the outrageous conduct claim to go to the jury. After the jury found for Mr. Cannon on that claim, Ms. Surber commenced this appeal.

II. Standard of Review

As a preliminary matter, we must consider the standard of review applicable to this case. Because Ms. Surber is challenging only the disposition of the malicious harassment claim, we apply the standard of review for a trial court's decision on a motion for directed verdict. Our task is to review the record to determine whether the evidence was sufficient to create an issue for the jury to decide. *Underwood v. Waterslides of Mid-America, Inc.*, 823 S.W.2d 171, 176 (Tenn. Ct. App. 1991). This standard of review was summarized in *State Farm General Ins. Co. v. Wood*, 1 S.W.3d 658 (Tenn. Ct. App. 1999):

A directed verdict is appropriate only when the evidence is susceptible to but one conclusion. *Eaton v. McLain*, 891 S.W.2d 587, 590 (Tenn.1994); *Long v. Mattingly*, 797 S.W.2d 889, 892 (Tenn. Ct. App.1990). We must "take the strongest legitimate view of the evidence favoring the opponent of the motion." *Id.* In addition, all reasonable inferences in favor of the opponent of the motion must be allowed, and all evidence contrary to the opponent's position must be disregarded. *Eaton*, 891 S.W.2d at 590; *Long*, 797 S.W.2d at 892.

Wood, 1 S.W.3d at 663. Questions of law receive *de novo* review with no presumption of correctness. *Presley v. Bennett*, 860 S.W.2d 857, 859 (Tenn. 1993).

III. Background

The civil cause of action for malicious harassment is created in Tenn. Code Ann. § 4-21-701. As the district court's certified questions suggest, its legislative history has engendered some confusion about its application. In its present incarnation, Tenn. Code Ann. § 4-21-701 states:

- (a) There is hereby created a civil cause of action for malicious harassment.
- (b) A person may be liable to the victim of malicious harassment for both special and general damages, including, but not limited to, damages for emotional distress, reasonable attorney's fees and costs, and punitive damages.

When this legislation was originally adopted in 1990, Tenn. Code Ann. § 4-21-701(a) began with the phrase, "In addition to the criminal penalty provided in § 39-17-313. . ." 1990 Tenn. Public Acts ch. 908, § 1. At the time, Tenn. Code Ann. § 39-17-313 [repealed] was a Class D felony which defined the offense of civil rights intimidation. Days after Tenn. Code Ann. § 4-21-701 was enacted, our legislature repealed Tenn. Code Ann. § 39-17-313. However, shortly thereafter, the legislature enacted another civil rights intimidation felony statute, Tenn. Code Ann. § 39-17-309, which was

substantially similar to § 39-17-313 [repealed].¹ 1990 Tenn. Pub. Acts ch. 984. The first paragraph of § 309(a), exactly replicated Tenn. Code Ann. § 39-17-313(a) [repealed]. While the other provisions of § 309 did not repeat the repealed § 313 verbatim, they echoed its language. Section 309 provided:

(a) The general assembly finds and declares that it is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment, and physical harm caused by the activities of groups and individuals. It is not the intent of this section to interfere with the exercise of rights protected by the constitution of the United States. The general assembly recognizes the constitutional right of every citizen to harbor and express beliefs on any subject whatsoever and to associate with others who share similar beliefs. The general assembly further finds that the advocacy of unlawful acts by groups or individuals against other persons or groups for the purpose of inciting and provoking damage to property and bodily injury or death to persons is not constitutionally protected, poses a threat to public order and safety, and should be subject to criminal sanctions.

(b) A person commits the offense of intimidating others from exercising civil rights who:

(1) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee;

(2) Injures or threatens to injure or coerces another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee;

(3) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee.

(4) Damages, destroys or defaces any real or personal property of another person with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the

¹The effective date of Tenn. Code Ann. § 4-21-701 was April 17, 1990. On April 30, 1990 Tenn. Code Ann. § 39-17-309 became effective.

constitution or laws of the United States or the constitution or laws of the state of Tennessee.

(c) It is an offense for a person to wear a mask or disguise with the intent to violate subsection (b).

As it presently exists, Tenn. Code Ann. § 4-21-701 makes no express reference to either Tenn. Code Ann. § 39-17-313 [repealed], or to Tenn. Code Ann. § 39-17-309.

In the wake of confusion engendered by this unique legislative history, our Supreme Court undertook to address the interpretation and application of the statute creating the tort of malicious harassment. In *Washington v. Robertson County, Tennessee*, 29 S.W.3d at 468, the Court found that “the elements of the civil claim of malicious harassment under Tenn. Code Ann. § 4-21-701(1998) are derived from the criminal offense of civil rights intimidation under Tenn. Code Ann. § 39-17-309 (1997).” In so holding, the court reasoned:

The legislative history of Tenn. Code Ann. § 4-21-701 indicates that the supporters of the legislation favored creation of a civil remedy for so-called "hate crimes" committed by ethnic and racial supremacist groups such as the Ku Klux Klan, Aryan Nation and Skinheads. The civil remedy was to be in addition to, but separate from, the applicable criminal statutes set forth first in Tenn. Code Ann. § 39-17-313 [repealed] and then in Tenn. Code Ann. § 39-17-309.

Numerous comments made by legislators, both in the Senate and the House, illustrate this intent by frequently discussing the civil claim in relation to the related criminal provisions that make intimidation a felony.²

² Examples of legislator comments given by the Court include:

[It] makes it a felony, malicious harassment, if the attack on the person or on the property is done because of ... [a person's] race, religion, national origin, . . . or ancestry.

2023 is a bill that just makes it a felony to maliciously harass someone because of their race, color, religion, ancestry, or national origin. Harassment means to cause physical injury to another person [or] to damage, destroy or deface any real or personal property.

[W]e already have the, the crime of malicious harassment, and it's a class D felony. It involves cross burnings, it involves ... causing physical injury to another person as a result of intimidation or harassment based upon race, color, religion or ancestry. What, what we're doing is adding a new section to the already existing felony that will say it's also illegal for those same reasons to incite others by word or act to the acts prohibited.... I'm not sure that it's not but an incremental increase in what's already included within the existing class D felony and then including the civil remedy as described.

This bill is a very simple bill.... It increases the penalty of malicious harassment. We need this bill for

(continued ...)

While we recognize that Tenn. Code Ann. § 4-21-701 no longer contains a specific reference to a criminal statute, we conclude that given the legislative history and intent, the elements of malicious harassment are found by examining its counterpart criminal statutes. We find it unnecessary and illogical to rely on the repealed statute, Tenn. Code Ann. § 39-17-313, given the similar provisions of Tenn. Code Ann. § 39-17-309 presently in effect. For example, like § -313(a), the provisions of § -309(a) state that "[t]he general assembly finds and declares that it is the right of every person regardless of race, color, ancestry, religion or national origin, to be secure and protected from fear, intimidation, harassment and bodily injury caused by the activities of groups and individuals." Tenn. Code Ann. § 39-17- 309(a) (1997) (emphasis added).

Washington, 29 S.W.3d at 472-73.

The Court defined the elements required to establish a claim of malicious harassment, as follows:

Accordingly, we conclude that a claim of malicious harassment requires not only that a person acted maliciously, i.e., ill-will, hatred or spite, but also that a person unlawfully intimidated another from the free exercise or enjoyment of a constitutional right by injuring or threatening to injure or coercing another person or by damaging, destroying or defacing any real or personal property of another person. *See* Tenn. Code Ann. § 39-17- 309(b) (1997).

Id. at 473.

IV. Analysis

We must apply the Supreme Court's holdings regarding the elements necessary to establish a claim for malicious harassment to the facts in this case and determine whether the evidence was sufficient to create an issue for the jury to decide. Both Ms. Surber and Mr. Cannon have argued that *Washington* supports their position.

Ms. Surber's claim is that Mr. Cannon's conduct, characterized by her as malicious and harassing, deprived her of her constitutional right to privacy in which she includes the right to be left alone. She alleges the conduct impacted her First Amendment right of association, by denying her the ability to form friendships and interact with others, and denied her the quiet enjoyment of her

²(...continued)

the problems that we have had with Aryan Nation, the Ku Klux Klan, in Pulaski, and the Skinheads that come here and invade and pester the good community and the citizenry.

Washington at 472-73 (citations omitted).

property. She also asserts that the harassment was gender-based, that it was directed to her because of her gender. For the reasons explained below, we find that the trial court properly determined that the evidence in this case was not sufficient to create an issue for the jury because there is no material evidence of conduct constituting malicious harassment.

Tennessee Code Annotated § 39-17-309, which provides the elements necessary to establish malicious harassment, specifically addresses the legislature's concern about "intimidation" arising from "race, color, ancestry, religion or national origin." This language identifies the statute as an "ethnic intimidation" or "hate crimes" statute, similar to those passed in a number of states. *See* George L. Blum, Annotation, *Validity, Construction, and Effect of "Hate Crimes" Statutes, "Ethnic Intimidation" Statutes, or the Like*, 22 A.L.R.5th 261 (1994). In general, conviction under such statutes requires proof of the defendant's specific intent to assault or commit other specified acts due to the defendant's perception of the victim's race, religion, national origin or other factor defined by the relevant statute. *See id.* at 275, 316-21.

By its own terms, Tennessee's civil rights intimidation statute requires a showing of specified actions "with intent to unlawfully intimidate another from the free exercise or enjoyment of any right or privilege secured by the constitution or laws of the state of Tennessee" or "with the intent to unlawfully intimidate another because that other exercised any right or privilege secured by the constitution or laws of the United States or the constitution or laws of the state of Tennessee." Tenn. Code Ann. § 39-17-309(b). Both the criminal civil rights intimidation statute and the civil malicious harassment statute have been held to require the specific intent to intimidate based on civil rights motives. *Vafaie v. Owens*, No. 01A01-9510-CV-00472, 1996 WL 502133 at *7 (Tenn. Ct. App. Sept. 6, 1996) (no Tenn. R. App. P. 11 application filed) (summary judgment on Tenn. Code Ann. § 4-21-701 claim appropriate because plaintiff did not allege defendants' actions were intended to prevent her from exercising any one of her civil rights or were motivated by anything other than their desire that she accept liability for disputed debts); *State v. Morrow*, No. 01C01-9612-CC-00512, 1998 WL 917802 at * 12 (Tenn. Crim. App. Dec. 22, 1998) (*aff'd* sub nom. on other grounds in *State v. Darden*, 12 S.W.3d 455 (Tenn. 2000)) (evidence in criminal prosecution under Tenn. Code Ann. § 39-17-309 (b)(2) was clear that defendants intended to injure or threaten victims because the Confederate flag was displayed on their truck).

There is simply no evidence in this record that Mr. Cannon's actions were motivated by any intent to intimidate Ms. Surber at all. Consequently, there is none to indicate an intention to prevent her from exercising any civil right or as retribution for the exercise of any such right by her.

In addition, there is no evidence that Mr. Cannon's actions were directed toward Ms. Surber because of her "race, color, ancestry, religion or national origin," and she does not claim they were. Rather, she asserts a gender-based motivation, because Mr. Cannon had never exposed himself to a male, and argues that Tenn. Code Ann. § 4-21-701 should be read to include gender based harassment. Based on *Washington*, we cannot broaden the legislature's definition of malicious harassment beyond the elements of civil rights intimidation, as set out in Tenn. Code Ann. § 39-17-309. Having considered the plain language of § 309, we fail to see that its reach extends to gender based discrimination. Other statutes related to gender based bias use specific language prohibiting

discrimination on account of “sex.” *See, e.g.*, Tenn. Code Ann. §§ 4-21-401(a)(1), 4-21-403, 4-21-404(1), 4-21-601(c), 50-2-202(a), 62-27-123(c). That language is conspicuously absent from Tenn. Code Ann. § 39-17-309(a).

Our conclusion that Tenn. Code Ann. § 39-17-309(a) does not reach conduct motivated by gender based animus is bolstered by the holding in *Young v. State Farm Mut. Auto. Ins. Co.*, 868 F. Supp. 937 (W.D. Tenn. 1994). In that case, an employee over the age of forty sued her employer for, among other causes of action, malicious harassment pursuant to Tenn. Code Ann. § 4-21-701 based on age discrimination. The court therein dismissed the claim because § 39-17-309(a) did not mention age as a protected classification. *Young*, 868 F.Supp. at 942. The *Young* court concluded that “[t]he section offers no protection from harassment on the basis of age.” *Id.* *See also Parr v. Middle Tenn. State Univ.*, No. M1999-01442-COA-R3-CV, 1999 WL 1086451 at *4 (Tenn. Ct. App. Dec. 3, 1999) (perm. app. denied May 15, 2000) (The trial court properly dismissed plaintiff’s malicious harassment claim because she alleged only harassment based on her disability). The same principle applies here.³ The legislature did not include gender in its civil rights intimidation statute, and we cannot add it.

Thus, we cannot say that the trial court erred in granting a directed verdict as to Ms. Surber’s malicious harassment claim. Accordingly, the judgment of the trial court is affirmed. This case is remanded for any further proceedings which may be necessary. Costs of this appeal are to be taxed to Ms. Surber, for which execution may issue if necessary.

PATRICIA J. COTTRELL, JUDGE

³Neither the legislature, the trial court, nor this court left Ms. Surber without a cause of action. Her claim of outrageous conduct went to the jury. Similarly, Mr. Cannon’s actions did not go without consequence. He was convicted of indecent exposure, sentenced, and has paid restitution to Ms. Surber.